

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ILDEFONSO PEREZ,

Defendant and Appellant.

G053127

(Super. Ct. No. 11CF1208)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gary S. Paer, Judge. Conditionally reversed and remanded as directed.

Lynda A. Romero, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton and Adrienne S. Denault, Deputy Attorneys General, for Plaintiff and Respondent.

*

*

*

After remand from a prior reversal, defendant Ildefonso Perez appeals his sentence of 25 years to life for a conviction of second degree murder, attempted murder, and the imposition of a sentence enhancement. We originally remanded this matter to conduct a hearing pursuant to *People v. Franklin* (2016) 63 Cal.4th 261 (*Franklin*), because Perez was 17 years old at the time of the crime.

We filed that opinion in September 2017. In October 2018, Perez filed a motion to recall the remittitur. (Cal. Rules of Court, rule 8.272(c)(2).) He argued that before his case was final, the Public Safety and Rehabilitation Act of 2016 (Proposition 57) was adopted and became effective. Among other things, Proposition 57 prohibited the direct filing of juvenile cases in criminal court. In February 2018, the California Supreme Court held that the relevant provisions of Proposition 57 applied retroactively to all cases not yet final at the time the initiative was adopted. (*People v. Superior Court (Lara)* (2018) 4 Cal.5th 299 (*Lara*).) After briefing, we granted the motion to recall the remittitur, vacated our opinion, and invited further briefing on the merits of Perez’s argument.¹

We conclude that Perez’s convictions must be conditionally reversed and remanded to conduct a juvenile transfer hearing in accordance with *Lara*. If the case is ultimately transferred to criminal court, the convictions will be reinstated, and the criminal court must decide if a hearing pursuant to *Franklin* is necessary, and, if so, conduct the hearing. Resentencing is not required.

Perez also argues, and the Attorney General agrees, that the abstract of judgment is incorrect. We shall order the necessary correction.

¹ The Attorney General, while not arguing our decision to remand is incorrect, asserts that we should have explicitly construed Perez’s petition to recall the remittitur as a writ of habeas corpus, and requests we “clarify the basis” of our decision to grant the motion in this opinion. As the motion to recall the remittitur has already been granted, we decline to do so.

I

FACTS AND PROCEDURAL HISTORY

For purposes of this appeal, we need not delve into the facts of the case. In 2013, Perez was convicted of first degree murder (Pen. Code, § 187),² attempted murder (§§ 664, 187), and street terrorism (§ 186.22, subd. (a)). Two sentence enhancements were also found true by the jury; commission of the murder for the benefit of a street gang (§ 186.22, subd. (b)(1)), and the personal use of a deadly weapon (§ 12022, subd. (b)(1)). He was sentenced to a total term of 35 years to life.³ (*People v. Perez* (June 26, 2015, G049443) [nonpub. opn.] (*Perez*).)

Due to a change in the law between the time of trial and the appeal, we reversed the murder conviction, giving the prosecution the choice to accept a reduction of the charge to second degree murder or retry the case. We also determined Perez's contention that his sentence was unconstitutional, because he was 17 years old at the time, was not ripe for adjudication due to our decision to remand on other grounds. (*Perez, supra*, G049443.)

On remand, the prosecution accepted and the court ordered the reduction of the murder charge to second degree. Perez was sentenced to 15 years to life on the murder charge, a consecutive term of nine years for attempted murder, and one year on the deadly weapon sentence enhancement, for a total sentence of 25 years to life.

Perez now appeals.

² Subsequent statutory references are to the Penal Code.

³ This sentence included a stay pursuant to section 654 on the street terrorism charge.

II DISCUSSION

Proposition 57 and Lara

As noted above, Proposition 57 prohibits the direct filing of juvenile cases in criminal court. This provision is retroactive: “The possibility of being treated as a juvenile in juvenile court—where rehabilitation is the goal—rather than being tried and sentenced as an adult can result in dramatically different and more lenient treatment. Therefore, Proposition 57 reduces the possible punishment for a class of persons, namely juveniles. For this reason, [the *In re Estrada* (1965) 63 Cal.2d 740] inference of retroactivity applies. As nothing in Proposition 57’s text or ballot materials rebuts this inference, we conclude this part of Proposition 57 applies to all juveniles charged directly in adult court whose judgment was not final at the time it was enacted.” (*Lara, supra*, 4 Cal.5th at pp. 303-304.)

Perez’s appeal was pending at the time Proposition 57 was enacted; accordingly, it unquestionably applies to his case. We therefore must conditionally reverse Perez’s convictions and his sentence, and remand the matter to juvenile court to conduct a transfer hearing pursuant to *Lara*. “If, after conducting the hearing, the juvenile court judge determines that [defendant]’s case should be transferred to a court of criminal jurisdiction, then his convictions will be reinstated. The court is then to resentence [defendant] within the bounds of its discretion But if the juvenile court determines that [defendant] is amenable to rehabilitation, and should remain within the juvenile justice system, then his convictions will be deemed juvenile adjudications. The juvenile court is then to impose an appropriate disposition within its discretion under juvenile court law.” (*People v. Vela* (2018) 21 Cal.App.5th 1099, 1102.)

Franklin

Perez originally argued that his sentence was unconstitutional because he was a juvenile offender. He offered this argument, however, before the California Supreme Court decided *Franklin, supra*, 63 Cal.4th 261. *Franklin* concluded the procedures set forth in sections 3051 and 4801, which require a parole hearing during a juvenile offender's 25th year of incarceration, mooted any cruel and unusual punishment challenge to a 50-year-to-life sentence. (*Franklin, supra*, 63 Cal.4th at p. 268.) In his reply brief, Perez stated he believed that *Franklin* was wrongly decided, but acknowledged that we are required to follow it. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Accordingly, we cannot consider Perez's claim that his sentence constitutes cruel and unusual punishment.

Franklin also makes clear that juvenile offenders are entitled to make a record of mitigating evidence tied to their youth at the sentencing hearing. (*Franklin, supra*, 63 Cal.4th at p. 269.) These factors include a defendant's "cognitive ability, character, and social and family background at the time of the offense." (*Ibid.*) In his reply brief, Perez requests such a hearing. "It is not clear whether Franklin had sufficient opportunity to put on the record the kinds of information that sections 3051 and 4801 deem relevant at a youth offender parole hearing. . . ." (*Id.* at p. 284.) The same is true here. While Perez need not be resentenced, "we remand the matter to the trial court for a determination of whether [defendant] was afforded sufficient opportunity to make a record of information relevant to his eventual youth offender parole hearing." (*Ibid.*)

"If the trial court determines that [defendant] did not have sufficient opportunity, then the court may receive submissions and, if appropriate, testimony pursuant to procedures set forth in section 1204 and rule 4.437 of the California Rules of Court, and subject to the rules of evidence. [Defendant] may place on the record any documents, evaluations, or testimony (subject to cross-examination) that may be relevant at his eventual youth offender parole hearing, and the prosecution likewise may put on

the record any evidence that demonstrates the juvenile offender’s culpability or cognitive maturity, or otherwise bears on the influence of youth-related factors. The goal of any such proceeding is to provide an opportunity for the parties to make an accurate record of the juvenile offender’s characteristics and circumstances at the time of the offense so that the Board, years later, may properly discharge its obligation to ‘give great weight to’ youth-related factors (§ 4801, subd. (c)) in determining whether the offender is ‘fit to rejoin society’ despite having committed a serious crime ‘while he was a child in the eyes of the law’ [Citation].” (*Franklin, supra*, 63 Cal.4th at p. 284.)

Accordingly, if this matter is ultimately transferred back to criminal court after the juvenile transfer hearing, the court must consider if such a hearing is necessary, and, if so, conduct the hearing.

Correction of Abstract of Judgment

Although on remand, Perez’s conviction was reduced from first to second degree murder, the abstract of judgment reflects he was convicted of first degree murder. Perez argues, and the Attorney General agrees, that the abstract should be corrected to reflect this. We agree and shall order a correction. (See *People v. Kim* (2012) 212 Cal.App.4th 117, 123-124 [“courts have inherent authority to correct clerical errors in a sentence at any time”].)

III

DISPOSITION

The judgment of the trial court is conditionally reversed.

The matter is remanded to the juvenile court with directions to conduct a transfer hearing no later than 90 days from the filing of the remittitur. If, at the transfer hearing, the juvenile court determines that it would have transferred Perez to a court of criminal jurisdiction, then the convictions shall be reinstated as of that date.

If, at the transfer hearing, the juvenile court determines that it would not have transferred Perez to a court of criminal jurisdiction, then Perez's criminal convictions and enhancements will be deemed to be juvenile adjudications as of that date. The juvenile court is then to conduct a dispositional hearing within its usual time frame.

If the convictions are reinstated, the criminal court shall then conduct a hearing, pursuant to *Franklin*, to determine if the record is sufficient for Perez's future parole hearing, and, if not, to conduct such a hearing. Resentencing is not required.

The clerk of the court shall correct the abstract of judgment to reflect that Perez was convicted of second degree, not first degree, murder. If the convictions are deemed juvenile adjudications, the clerk shall forward a certified copy of the abstract of judgment to Department of Corrections and Rehabilitation, Division of Juvenile Facilities. If the convictions are reinstated, the clerk shall forward a certified copy of the abstract of judgment to the Department of Corrections and Rehabilitation.

In all other respects, the judgment is affirmed.

MOORE, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

ARONSON, J.